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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 727

ARTHUR G. VESCELIUS, TRUSTEE IN BANKRUPTCY OF RIVER EDGE ESTATES, INC.,

Petitioner,

vs.

ABRAHAM A. WEDEEN, ASSIGNEE FOR THE BENEFIT OF CREDITORS OF JAMAICA CONCRETE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

WILLIAM N. GURTMAN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 727

ARTHUR G. VESCELIUS, Trustee in Bankruptcy of River Edge Estates, Inc.,

Petitioner,

vs.

ABRAHAM A. WEDEEN, Assignee for the Benefit of Creditors of Jamaica Concrete Corporation.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of Arthur G. Vescelius respectfully shows to this Honorable Court:

A.

Summary Statement of Matters Involved.

Your petitioner is the trustee in bankruptcy of River Edge Estates, Inc., a New Jersey corporation, appointed by the District Court of New Jersey. This petition is filed for the purpose of procuring an adjudication of petitioner's right, as such trustee, to a certain fund deposited by or in behalf of the said River Edge Estates, Inc. with the Clerk

of the New Jersey Chancery Court in connection with certain proceedings instituted in said court prior to the bankruptcy by the predecessor in interest of respondent. Petitioner contends that by virtue of legal technicalities based upon the alleged effect of a decree made in said Court of Chancery after the filing of the bankruptcy proceedings your petitioner has been deprived of the right to adjudicate his interest in said fund. Furthermore, the District Court and the Circuit Court of Appeals refused to grant to your petitioner appropriate interim relief pursuant to the rules of said courts thereby preventing the proper and orderly distribution of the bankrupt estate in accordance with the provisions of the Bankrutpcy Act.

The bankrupt was organized in 1939 and engaged in the real estate development business in Bergen County, New Jersey. In June, 1940, Charles Masholie, a stockholder of Jamaica filed a suit in the New Jersey Court of Chancery to impress a trust on all the properties of River Edge and for other relief including the recovery of moneys for materials furnished and services rendered. The suit was predicated upon the improper withdrawal of the funds of Jamaica by one, Daniel Salvator, who had managed and directed the affairs of Jamaica and who had apparently used such funds in acquiring the lands on which River Edge conducted its development operations. Concurrently with the filing of this suit a Lis Pendens was filed in the Bergen County Clerk's Office. At the time of the filing of this suit, River Edge had converted the acreage purchased as aforesaid into building lots by cutting streets, laying sidewalks, sewers and other utilities; it had built a large number of dwellings, some of which were completed and sold, some were under contract, and others were in various stages of construction; it had incurred large obligations for materials and services and was heavily indebted to a bank mortagagee. The business of the bankrupt

was under the direction and control of the aforesaid Salvator.

On June 17, 1940, an order was advised in said Chancery proceedings by Vice Chancellor Charles M. Egan, one of the Vice Chancellors of said Court, directing the deposit "by or in behalf of" River Edge of the sum of $12,500.00 with the Clerk of the Court of Chancery to be held subject to the further order of said Court and directing the discharge of the Lis Pendens aforementioned. The said sum was deposited and the Lis Pendens discharged.

On February 11, 1941, a final hearing in the aforesaid proceedings was held before Vice Chancellor Egan. At this hearing application was made in behalf of Jacob Visel, who had theretofore been appointed custodial receiver of Jamaica by the New York Supreme Court, to intervene in the cause, which application was granted. No notice of these proceedings was given to the general creditors of River Edge and they were not present or otherwise represented at the hearing and their interest in the affairs of River Edge was in no way considered or adjudicated. River Edge, as defendant in said Chancery proceedings, offered no testimony and presented no witnesses to indicate to the court the status of its properties and the interest of its creditors.

On March 20, 1941, while the aforementioned suit was pending for determination by Vice Chancellor Egan, and without any knowledge of said proceedings, a creditors' bill was filed against River Edge, in said Chancery Court, with Vice Chancellor Vivian M. Lewis, another Vice Chancellor of said Court, alleging the insolvency of River Edge and requesting the appointment of receivers. An order was advised by Vice Chancellor Lewis granting the application and appointing custodial receivers.

On March 31, 1941, Vice Chancellor Lewis made an order adjudging River Edge insolvent and appointing statu-

tory receivers. On the same day Vice Chancellor Egan filed his opinion, finding in favor of Jamaica in the suit pending before him.

On April 1, 1941, the statutory receivers aforementioned, by authority of Vice Chancellor Lewis, applied to Vice Chancellor Egan for leave to intervene in the pending proceedings. Such application was predicated on the allegation that the claims of the creditors of River Edge should be properly adjudicated in the pending suit before a decree was entered. This application was strenuously opposed by counsel for Jamaica.

On April 25, 1941, an involuntary petition in bankruptcy was filed against River Edge in the District Court of New Jersey, by creditors other than the creditors who had filed the insolvency proceedings in Chancery. The matter was referred to Referee John Grimshaw, Jr. On April 30, 1941, the Referee appointed receivers in bankruptcy and issued general restraints against interference with the properties and affairs of River Edge (R. 5-7). Due notice of this order was given to all interested parties.

On May 6, 1941, Vice Chancellor Egan filed his opinion denying the application of the Chancery receivers to intervene in the trust suit. In view of the filing of the bankruptcy proceedings and the order of April 30 aforementioned, the Chancery receivers (who were the same persons who were appointed bankruptcy receivers) had no further authority in the premises except such authority and direction as they would thereafter receive from the Bankruptcy Court.

On May 8, 1941, on the application of counsel for Jamaica, Vice Chancellor Egan advised a decree granting the relief prayed for by Jamaica, impressing a trust on all the properties of River Edge, directing a reference to a Master in Chancery to state the account due from River Edge to Jamaica, directing the payment of counsel fees

and other allowances out of the funds on deposit and ordering the payment of the balance of said deposit to Jamaica. No reference was made in said decree to the existing bankruptcy proceedings or to the interest of your petitioner or of the other creditors of River Edge.

On May 21, 1941, an adjudication of bankruptcy was entered. On May 28, 1941, Jamaica by David H. Harris, attorney, filed a petition in the Bankruptcy Court praying that the receivers in bankruptcy be directed to turn over to Jamaica all of the property of the bankrupt in accordance with the provisions of the Chancery decree of May 8 aforementioned. The estate of the bankrupt on that date consisted of the $12,500.00 on deposit with the Chancery Clerk and approximately $1500.00 in the possession of the bankruptcy receivers, which latter sum was realized by a sale to a subsidiary of the bank mortgagee of the right, title and interest of the bankrupt in its real estate holdings. By the filing of this petition, Jamaica availed itself of and consented to the jurisdiction of the Bankruptcy Court to determine its rights in the bankrupt estate.

On June 4, 1941, the bankruptcy receivers filed an answering and cross petition to the petition of Jamaica, asserting their superior right to the possession of the fund on deposit with the Clerk in Chancery.

On June 25, 1941, the first meeting of creditors of the bankrupt was held and your petitioner was elected and qualified as trustee. Thereafter, on July 31, 1941, petitioner filed a further petition in the Bankruptcy Court asserting his right to possession of the fund on deposit with the Chancery Clerk. An order was thereupon made directing all persons in interest to show cause why the relief prayed for by petitioner should not be granted.

On August 13, 1941, Jacob Visel, the custodial receiver who had intervened in the original Chancery suit, filed an affidavit in the bankruptcy proceedings charging that David

H. Harris had no authority from Jamaica to file the reclamation petition on May 28 aforementioned and challenging the authority of the Referee to act in the premises. This step was taken in the face of the fact that Visel previously (on June 25, 1941) voluntarily appeared before the Referee on another phase of the matter, had entered his appearance, and had participated in the proceedings at a time when Harris was also present as attorney for Jamaica. On September 4, 1941, Harris filed a statement with the Referee asserting his lack of authority to appear for Jamaica and praying leave to withdraw the petition of May 28.

On September 18, 1941, Abraham A. Wedeen filed an affidavit in the Bankruptcy Court setting forth that on July 30, 1941, an assignment for the benefit of creditors had been executed by Jamaica to him and that he had duly qualified as such assignee by an order made in the Supreme Court of New York. Accompanying the affidavit was a notice of special appearance challenging the jurisdiction of the Referee to act in the premises. The aforesaid assignment for the benefit of creditors was executed by the same Daniel Salvator (and his wife as the officers of Jamaica) who had been responsible for the affairs of both Jamaica and bankrupt, and without notice to petitioner.

Whether intended or not, the effect of the aforesaid action by Visel, Harris and Wedeen, would be to evade the voluntary acceptance by Jamaica of the jurisdiction of the Bankruptcy Court by the filing of the petition of May 28. At the same time it would tend to prevent your petitioner from asserting any right to the Chancery fund in the State court because, relying on the good faith of the action taken by Jamaica in filing the petition in reclamation, the time for filing an appeal from the Chancery decree had been permitted to expire. By strange coincidence, neither Visel, nor Harris, nor Wedeen, brought the matter

of lack of authority or lack of jurisdiction to the attention of the Bankruptcy Court until after the time for appeal had expired. The best answer to the good faith of these proceedings is the conclusion of the Referee concerning the matter (R. 14).

> "It is unconceivable that it took Mr. Harris from May 28th to August 27th to discover that he was without authority to represent Jamaica Concrete Corporation. And it is difficult to reconcile Mr. Visel's affidavit with the facts. On August 27th he swore that he had just learned of the filing of the reclamation petition and the appearance of Mr. Harris as attorney for Jamaica Concret Corporation. Yet as early as June 25th Mr. Visel was present in court when the reclamation proceeding was discussed and Mr. Harris appeared as counsel for Jamaica Concrete Corporation.
>
> "I am unable to place any reliance upon either the statement or the affidavit. Whether their inaccuracies are due to indifference or design is not a question requiring determination at this time. The result would be the same in any event. I cannot escape the conclusion that the attempt to withdraw the reclamation petition was actuated by fear of the legal consequences resulting from the filing of the petition.
>
> "The application of Mr. Harris for leave to withdraw the reclamation petition will be denied. The special appearance of Mr. Visel will be dismissed."

On December 1, 1941, petitioner filed a petition alleging that Wedeen had announced his intention of seeking a distribution of the deposit fund and asking a restraint against such action pending a determination of the proceedings. On December 20, 1941, after notice to interested parties, an order was made restraining respondent, his attorneys and agents, from doing anything or issuing any process toward the procurement of a distribution of the deposit fund (R. 7-8). This order contained a specific provision declaring that the order of restraint originally

made on April 30, 1941, was to remain in full force and effect.

On March 6, 1942, Referee Grimshaw filed his memorandum determining the pending issues (R. 9-16) wherein he denied the application of Harris to withdraw the reclamation petition, dismissed the special appearance of Visel, affirmed the jurisdiction of the Bankruptcy Court in the premises, and directed that the trustee in bankruptcy apply to the Chancery Court for leave to intervene in the said proceedings, and reserved decision with respect to the application for the turn over of the fund on deposit in Chancery. On March 23, 1942, the Referee made an order pursuant to his said opinion (R. 17-18). Pursuant to the direction of the Referee as aforesaid petitioner applied to Vice Chancellor Egan and procured an order permitting him to intervene in the Chancery suit. Thereafter, respondent filed applications for the review of the orders of the Referee. Considering that the matters should be finally adjudicated, including the question of the propriety of the reference to the Court of Chancery, petitioner advised the Vice Chancellor of the filing of the petitions of review by respondent and obtained an order vacating the order of intervention to enable petitioner to file an application for review to the District Court, so that the entire matter might be adjudicated at one time. Thereafter petitioner applied to the District Court Judge for leave to file an application for review as of time, so that the entire matter might be before the court. This application was denied on the ground of failure to apply within time, although the other phases of the matter were before the court for review on the application of the respondent and had not yet been heard.

On April 1, 1943, the District Court Judge filed his opinion on the matters under review (R. 19-22), denying the jurisdiction of the Bankruptcy Court in the premises,

granting the right of Harris to withdraw his petition of reclamation and granting the right of Visel to a special appearance, and on April 2, 1943, orders were made, pursuant to said opinion reversing the orders of the Referee (R. 22-24).

Petitioner appealed to the Circuit Court of Appeals. In preparing the record for such appeal counsel for petitioner learned that in transmitting his certificate and papers in the cause to the District Court pursuant to Section 39A (8) of the Bankruptcy Act in connection with Jamaica's application for review, the Referee had failed, through inadvertance, to send up the transcript of the testimony of June 25, 1941, had before him, at which hearing both Visel and Harris were present and upon which hearing the Referee relied in denying Harris' application to withdraw Jamaica's petition and Wedeen's special appearance. Assuming the need of reference to this transcript for a complete record on appeal to the Circuit Court of Appeals, counsel for petitioner filed a reference thereto, within time, as a supplement to his designation of record on appeal designated therein as item 23. Respondent thereupon applied to the District Court for an order to exclude said item from the record on appeal, and over the objection of petitioner an order excluding the item was made (R. 47). Thereafter petitioner applied to the Circuit Court of Appeals for leave to supplement and correct the record on appeal by the inclusion of the item referred to, relying upon the right to interim relief pursuant to Rule 32 (3) of said Court and Rule 75 (h) of the Federal Rules of Civil Procedure. Such application was denied (R. 50).

While preparing the record for appeal to the said Circuit Court of Appeals, counsel for petitioner learned that respondent had procured a distribution of the $12,500.00 deposit fund except for a balance of $200.00. Such distribution was made on April 5, 1943, pursuant to demand of

counsel for respondent made by letter dated April 2, 1943, being the same day on which the orders of reversal were made by the District Court Judge. No notice of such demand for withdrawal was given to petitioner and neither of the orders of reversal of the District Court Judge directed such withdrawal. Considering that such withdrawal deprived petitioner of right to relief under Rule 62 of the Rules of Civil Procedure, and was in violation of the order of April 30, 1941, and was not authorized by the orders of reversal of April 2, 1943, petitioner applied to the District Court for an order directing the reinstatement of the fund pending decision on the appeal by the Circuit Court of Appeals. Such application was denied (R. 48-49). Thereupon application was made to the Circuit Court of Appeals for an order to the same effect. The application was denied (R. 50).

On December 13, 1943, the Circuit Court of Appeals affirmed the orders of the District Court for the reasons stated by that Court, and on the same day entered an order of affirmance of the District Court (R. 57-58).

As a result of the aforesaid decision denying the jurisdiction of the Court of Bankruptcy in the premises, the right to an orderly and equitable marshalling and distribution of the bankrupt estate is entirely destroyed. The decree in Chancery purports to control all of the property of the bankrupt, yet respondent denies the jurisdiction of the Court of Bankruptcy, leaving undisposed and undetermined the moneys of the bankrupt now in possession of the trustee. The trustee has been denied any right in the deposit fund withdrawn by respondent although neither petitioner nor the creditors of bankrupt ever had their day in any court for a determination of such right, thereby constituting a deprivation of property without due process of law. Whereas it would ordinarily be the right and duty

of petitioner to follow and attempt to recover from Salvator and others moneys improperly withdrawn from bankrupt, the assertion of such right would be futile since the avails to be realized thereby would be the property of respondent under the Chancery decree. The effect of the decision is that no court has complete jurisdiction to carry out an orderly liquidation of the bankrupt estate in direct contravention of the purpose and intent of the Bankruptcy Act.

B.

Jurisdictional Statement.

Petitioner shows that this Court has jurisdiction to review the judgment of the Circuit Court of Appeals by virtue of Bankruptcy Act, Section 24c, as amended June 22, 1938, 52 Stat. 854 (11 U. S. C. A., Section 47c) which provides:

> "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted".

This Court has jurisdiction to review the judgment complained of by certiorari. Judicial Code, Section 240 (28 U. S. C. A., Sec. 347), provides that in any case in a circuit court of appeals it shall be competent for this Court, upon the petition of any party thereto, to require by certiorari that the cause be certified to this Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought up by unrestricted writ of error or appeal.

C.

The Questions Presented.

Did the Court of Bankruptcy have exclusive non-delegable jurisdiction to determine the right of all interested parties in the fund deposited in the Court of Chancery?

Did the Referee have the power and authority to restrain interference with or distribution of the deposit fund pending a determination of the interest of all persons therein?

Was the Court of Bankruptcy bound by the decree made in the Court of Chancery?

Did the Circuit Court of Appeals err in refusing petitioner's application to correct and supplement the record on appeal?

Did the Circuit Court of Appeals err in refusing petitioner's application to correct and supplement the record on appeal?

Did the Circuit Court of Appeals err in refusing petitioner's application to reinstate the deposit fund pending determination of appeal?

D.

Reasons Relied on for Allowance of Writ.

Petitioner relies on the following reasons for the allowance of the writ of certiorari.

1. The decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court. The Circuit Court of Appeals held in effect that, because the Chancery proceedings in which the deposit was made were instituted and hearing was had therein prior to the filing of the bankruptcy proceedings, the Court of Bankruptcy was thereby deprived of all jurisdiction in the matter notwith-

standing that the interest of the creditors of the bankrupt were in no wise considered or adjudicated in such suit. This Court has repeatedly held that the jurisdiction of the Court of Bankruptcy is exclusive and non-delegable and is not limited or reduced by the existence of a lien or judgment in a prior State court proceedings where the circumstances require the interposition of the wide equity powers of the Court.

Taylor v. *Sternberg,* 293 U. S. 470;
Pepper v. *Litton,* 308 U. S. 295.

Furthermore the Court of Bankruptcy upon the filing of the bankruptcy petition on April 25, 1941, became vested with the right to the possession of all of the assets of the bankrupt, not only those actually in its possession, but also those constructively in its possession, such as the fund deposited in Chancery, which was deposited "by or in behalf of" the bankrupt.

Thompson v. *Magnolia Petroleum Co.,* 309 U. S. 478;
Whitney v. *Neuman,* 198 U. S. 539.

The Court of Bankruptcy has permitted the retention of jurisdiction by a State court over property of a bankrupt, in connection with proceedings pending in a State court but only in such cases where a specific judgment or lien on specific property had been fixed and determined prior to the intervention of bankruptcy which lien or judgment under principles of comity the Court of Bankruptcy found it unnecessary to disturb.

Metcalf v. *Barker,* 187 U. S. 165;
Pickens v. *Roy,* 187 U. S. 177;
Straton v. *New,* 283 U. S. 318;
Piedmont Coal v. *Hustead,* 294 F. 247;
McGonigle v. *Goutch,* 51 F. (2nd) 455;
Morris W. Haft & Bros. v. *Wells,* 93 F. (2nd) 991;

Union Joint Land Stock Bank v. *Byers*, 100 F. (2nd) 82;

Daniel v. *Wilson-Wessner-Wilkenson Co.*, 109 F. (2nd) 364.

2. The Referee had the power to restrain any interference with the properties and assets of the bankrupt pending a determination of all interests therein. One of the reasons assigned in the order of April 2, 1943, reversing the Referee's order of December 20, 1941, was "that the Court of Bankruptcy is without authority to prohibit the enforcement of said decree." It is to be noted that the restraints contained in the order of December 20, 1941, applied only to respondent, his attorneys and agents. This was clearly within the power of the Referee under Section 2 (15) of the Bankruptcy Act. This is borne out by the statement of the Judiciary Committee of the House of Representatives made in connection with the repeal of Section 3 of Rule 12 of the General Orders in Bankruptcy. I quote from page 19 of the report of the House Committee on the Judiciary of January 29, 1937;

> "The proviso added is an adoption of part of the former General Order XII which provides that applications for an injunction to stay proceedings of a court or officer of the United States or of a State shall be decided by the Judge. Some courts have confused this section with Sec. 11a and have taken the view that the issuance of injunctions is governed by the latter section, whereas the framers of the Act intended Sec. 2a (15) to be for the use of receivers and trustees in protecting and preserving the estate, and Sec. 11 for the use of the bankrupt in securing his discharge. There has also been some question about the power of Referees to issue injunctions. The weight of authority allows Referees to enjoin the parties to a suit although they were prohibited by the former General

Order XII, clause 3, from enjoining the court itself, this power being reserved to the judge. As a matter of actual practice, of course, injunctions are not issued to restrain the court, but to restrain the litigants. These matters should be cleared up."

3. The Court of Bankruptcy was not bound by the Chancery decree of May 8, 1941. The petition in bankruptcy was filed on April 25, 1941. It constituted a caveat to all the world of the vesting of the jurisdiction of the Court of Bankruptcy over the bankrupt and all its properties. Such decree was void by virtue of Section 67 A (1) of the Bankruptcy Act. The filing of the Lis Pendens constituted notice and was not a lien. Its effect was limited to June 17, 1940, when it was discharged.

Allen v. *Morris*, 34 N. J. L. 159.

This Court has recognized the distinction between a lien and the right to a lien.

Metcalf v. *Barker*, 187 U. S. 165.

The rights of the creditor's of the bankrupt in the deposit fund was superior to the right of respondent.

Frelinghuysen v. *Nugent*, 36 F. 229;

In re Harrigan Supply Co., 2 F. (2nd) 791;

In re Toms River Trust Co. of Toms River, 192 A 47.

The decision of the Circuit Court of Appeals deprives them of that right without due process of law.

4. The Referee was required by Section 39 A (3) of the Bankruptcy Act to transmit promptly to the Clerk of the Court the transcript of the evidence taken before him on June 25. This he inadvertently neglected to do. The petitioner was in no way responsible for this omission. The transcript was necessary for a proper record on appeal

because it constituted the basis of the Referee's denial of the Harris application to withdraw the reclamation petition and the Wedeen application for a special appearance. The power and authority to correct and supplement the record as indicated is clearly available under Rule 75 H of the Federal Rules of Civil Procedure, and the denial of the petitioner's application constituted a deprivation of his rights in the cause.

5. Rule 32 (3) of the Rules of the Circuit Court of Appeals for the Third Circuit provides as follows:

> "Interlocutory Relief—Application for—Contents. Where, pending appeal, application is made to the court, or a circuit judge, for any relief which might have been granted by the trial judge, such application must show either that it is not practicable to apply to the trial judge for the relief or that application has been made to him and denied, with the reasons given by him for the denial. With the application shall be filed copies of such parts of the record in the court below as are available; and timely notice of the application shall be given the opposite party or his counsel."

When counsel for respondent made demand of the Clerk of the Court of Chancery for a distribution of the deposit fund on the same day that the District Court's orders of reversal of the Referee's orders were made, he, in effect, deprived petitioner of the right to procure a stay of the proceedings pending appeal in accordance with Rule 62 of the Federal Rules of Civil Procedure. He was also acting in contravention of the original order of restraint of April 30, 1941. It was vitally necessary in the ultimate interest of all parties concerned that the deposit fund be maintained intact pending the determination of the appeal. Under the circumstances petitioner was clearly entitled to

an order directing the reinstatement of the fund, and such relief properly given under the rule aforementioned and under the general equity powers of the court to control the property of a bankrupt pending the adjudication of litigated questions.

WILLIAM N. GURTMAN,
Counsel for Petitioner.